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No. 82-11

IN THE
SUPREME COURT OF THE UNITED STATES

1982 Term

MENNONITE BOARD OF MISSIONS,
Appellant,

v.

RICHARD C. ADAMS,
Appellee.

APPEAL FROM THE
INDIANA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. Does a statutory scheme that requires notice by publication to a mortgagee before a tax sale violate the due process clause of the fourteenth amendment?

II. Does a statutory scheme that does not require notice to a mortgagee before the end of a mortgage redemption period constitute taking without just compensation?

III. May a state constitutionally distinguish between notice given to an owner and notice given to a mortgagee in a tax sale statutory scheme without violating the equal protection clause of the fourteenth amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.	i
TABLE OF CONTENTS.	ii
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS OR AFFIRM. . . .	1
STATEMENT OF THE CASE.	2
ARGUMENT	
I. THE QUESTIONS PRESENTED BY THE APPEAL ARE NOT SUBSTANTIAL ENOUGH TO REQUIRE PLENARY CONSIDERATION.. . . .	4
A. The Questions Raised By This Appeal Are Narrow.	4
B. Precedent From This Court Is Not Conflicting.	7
C. The Present Appeal Is Not Appropriate For Resolution Of Issues Not Raised By The Facts.	11
II. THE COURT BELOW PROPERLY RESOLVED THE CONSTITUTIONAL QUESTIONS BEFORE IT. .	16
CONCLUSION	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

Cases:	Page
Botens v. Aronauer, 32 N.Y. 2d 243, 344 N.Y.S.2d 892, appeal dismissed, 414 U.S. 1059 (1973).	12
Chapin v. Aylward, 204 Kan. 448, 464 P.2d 177 (1970).	5
Chesney v. Gresham, 64 Cal. App. 3d 120, 134 Cal. Rptr. 238 (1976), cert. denied, 434 U.S. 907 (1977).	4,18
Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), vacated because of independent state law grounds, 414 U.S. 100 (1973)	12
Collector of Revenue v. Parcels of Land Encumbered With Delinquent Tax Liens, 585 S.W.2d 486 (Mo. 1979).	20
Dow v. Michigan, 396 Mich. 192, 240 N.W.2d 450 (1976).	5
First Savings and Loan Association of Central Indiana v. Furnish, 174 Ind. App. 265, 367 N.E.2d 596 (1977).	passim

TABLE OF AUTHORITIES, Continued

Cases, Continued — Page

Greene v. Lindsey, ___ U.S. ___, 102 S. Ct. 1874 (1982) 8,10,11

Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 52 (1964) 13

Marlowe v. Kingdom Hall of Jehovah's Witnesses, 541 S.W.2d 121 (Tenn. 1976) 18

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 15

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) . . . . . passim

Quay Development, Inc. v. Elegante Building Corp., 392 So. 2d 901 (Fla. 1981) 4-5

St. Martin Evangelical Luthern Church v. South Dakota, 451 U.S. 772 (1981) 16

Texaco, Inc. v. Short, ___ U.S. ___, 102 S. Ct. 781 (1982) 7-8,8,10, 11

Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1977) 5,11,18,19

TABLE OF AUTHORITIES, Continued

Cases, Continued — Page

Umatilla County v. Porter, 12 Ore. App. 393, 507 P.2d 406 (1973) 5,12,21

United States v. Vuitch, 402 U.S. 62 (1971). 16

Western and Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981). 15

Statutes:

Ind. Code § 6-1.1-24-3 (Repl. vol. 1978). 12,14

Ind. Code § 6-1.1-24-4 (Repl. vol. 1978). 14,15

Other Authorities:

"Lawyers' Ethics on Trial," Newsweek, Aug. 23, 1982, at 37 15

Note, "The Constitutionality of Notice by Publication in Tax Sale Proceedings," 84 Yale L.J. 1505 (1975). . . 11

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MOTION TO DISMISS OR AFFIRM

The appellee in the present case moves this Court to dismiss the appeal of the appellant or, alternatively, to affirm the decision of the Court of Appeals of Indiana on the grounds that the questions presented by this appeal are not substantial enough to require plenary consideration and that the court below

correctly decided the constitutional issues presented by this case.

STATEMENT OF THE CASE

By letter dated August 11, 1982, Alexander L. Stevas, clerk of this Court, requested, on behalf of this Court, that the appellee file a response to the appellant's Jurisdictional Statement. This Motion to Dismiss or Affirm is in response to that request.

With that addition, for the purpose of this Motion to Dismiss or Affirm, the appellee, Richard C. Adams, will accept the Statement of the Case proposed by the appellant, Mennonite Board of Missions (hereinafter, the Board). See Jurisdictional Statement at 4-5. Adams is also in substantial accord with the Questions Presented that were proffered by the Board. See id. at i. This Court

should note, however, that although the Board challenged the Indiana tax sale statutes under the equal protection clause of the United States Constitution when formulating its Questions Presented, see id., it advanced no reasons why this Court should consider the statutes under such a challenge, see id. at 8-13. Nevertheless, Adams will briefly address the equal protection question.

No statutes or constitutional provisions other than those raised by the Board are necessary for the resolution of the questions raised by this appeal. Because these provisions are set out in the Jurisdictional Statement, id. at 2-3, they will not be repeated here.

ARGUMENT

I. THE QUESTIONS PRESENTED BY THIS APPEAL ARE NOT SUBSTANTIAL ENOUGH TO REQUIRE PLENARY CONSIDERATION.

A. The Questions Raised By This Appeal Are Narrow.

The questions raised by this appeal are very narrow and affect only a small number of persons; they are not the broad questions urged by the Board in its Jurisdictional Statement. This case involves the narrow questions of what notice is due to a mortgagee of land in a tax foreclosure sale and whether a state may constitutionally distinguish between a mortgagee and an "owner" of land when establishing the boundaries of what notice is due. Most of the cases relied upon by the Board do not address this question. See Chesney v. Gresham, 64 Cal. App. 3d 120, 134 Cal. Rptr. 238 (1976), cert. denied, 432 U.S. 907 (1977); Quay

Development, Inc. v. Elegante Building Corp., 392 So. 2d 901 (Fla. 1981); Chapin v. Aylward, 204 Kan. 448, 464 P.2d 177 (1970); Dow v. Michigan, 396 Mich. 192, 240 N.W.2d 450 (1976); Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1977); Umatilla County v. Porter, 12 Ore. App. 393, 507 P.2d 406 (1973). Indeed, the Court of Appeals of Indiana in its decision below relied heavily upon an earlier case, First Savings and Loan Association of Central Indiana v. Furnish, 174 Ind. App. 265, 367 N.E.2d 596 (1977) (reprinted in Jurisdictional Statement at 29-43) (hereinafter, Furnish), and the court in that case noted:

> Our research discloses only one case extending Mullane to mortgagees. Laz v. Southwestern Land Co. (1964), 97 Ariz. 69, 397 P.2d 52. It is not persuasive, being founded

> largely on vague and general statements of public policy.

367 N.E.2d at 601. More recent research by Adams indicated no additional cases, and the Board has not cited any other cases. Thus, any decision this Court would issue in the present case would not be as sweeping as the Board would wish.

In addition, the facts of the present case are unusual. The Board, as mortgagee, did not discover the mortgagor's default in property taxes until after not only the tax sale but also the two-year redemption period allowed by state law. Jurisdictional Statement at 4-5. Much more likely to occur is a situation more similar to that found in Furnish, supra. There, the court noted that a mortgagee who discovers a tax sale of the mortgaged property sometime before the expiration of the redemption period is protected by

his redemption rights. Id. at 600. The question presented by Furnish, not the question presented by the present appeal, is the more important question because it is reasonable to believe that a mortgagee usually would have actual notice from some source—the mortgagor either before or after the tax sale or activity on the land by the purchaser after the tax sale—than it is to believe that a typical mortgagee does not get actual notice of such a tax sale.

B. Precedent From This Court Is Not Conflicting.

The Board has attempted to show that a conflict exists between a leading case on the question of notice, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), and two more recent cases, Texaco, Inc. v. Short, ___ U.S. ___,

102 S. Ct. 781 (1982), and Greene v. Lindsey, ___ U.S. ___, 102 S. Ct. 1874 (1982), and has urged this Court to use the present appeal to resolve the alleged conflict. No such conflict exists, however. The three decisions factually are quite dissimilar from one another and from the present case. To the extent that Greene establishes a conflict with Mullane and Texaco, this conflict is resolved once it is realized that Greene was decided on a peculiar set of facts.

Mullane, supra, involved a challenge to a New York law that established notice provisions for an accounting of a common trust. No real estate was involved and the individual trusts that formed the common fund were described as "moderately sized," 339 U.S. at 307, thus indicating that the beneficiaries had little reason to keep apprised of their trusts'

activities. This Court determined that something other than notice by publication was due the beneficiaries, at least where they were easily ascertainable and, for the most part, lived out of the area in which the notice was published. Id. at 318. In doing so, this Court balanced the state's interest in final settlement of the trust against the individuals' due process interests, id. at 313-14, and noted that the case dealt with rights in intangible property. Id. at 316. Unlike a situation involving tangible property, the owner of which "usually arranges means to learn of any direct attack upon his possessory or proprietary rights," id., the beneficiaries of the trusts in Mullane were opposed by the very fiduciaries who were to take care of their interests. Id. Under these facts, this Court required notice other than by publication.

In Texaco, supra, this Court upheld the validity of an Indiana statutory scheme that caused mineral interests to lapse and become part of the interest of the land's surface owner if not used within a 20-year period. This Court determined that "no specific notice need be given of an impending lapse." 102 S. Ct. at 794.

Finally, in Greene, supra, this Court determined that mere posting of notice on an apartment door in a forcible detainer action is not sufficient notice where the process servers who posted the notice knew that the notices were often removed before they were seen by the intended tenants. A reading of this decision indicates that both the majority and minority believed the case to be governed by its peculiar facts. See 102 S. Ct. at 1879-80; id. at 1882-83 (O'Connor, J., dissenting). Greene apparently has little precedential

value even in forcible detainer actions; it in no way affects the questions raised by the present case. For these reasons, no conflict exists between Mullane, Texaco, and Greene that can be resolved by the present case.

C. The Present Appeal Is Not Appropriate For Resolution Of Issues Not Raised By The Facts.

The state legislatures in almost one-half of the states have adopted statutes that permit a tax sale of land to be held after no more notice is given to an actual owner of land than was given to the Board as mortgagee in the present case. See Note, "The Constitutionality of Notice by Publication in Tax Sale Proceedings," 84 Yale L.J. 1505, 1506 n. 4 (1975). These statutes have more often than not withstood constitutional challenges. Township of Montville, supra, 376 A.2d at 922-23

(Conford, P.J.A.D., dissenting). See, e.g., Botens v. Aronauer, 32 N.Y.2d 243, 344 N.Y.S.2d 892, appeal dismissed, 414 U.S. 1059 (1973); Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), vacated because of independent state law grounds, 414 U.S. 100 (1973); Umatilla County, supra. Nevertheless, if this Court should decide to examine the constitutional questions raised by statutes such as Ind. Code § 6-1.1-24-3 (Repl. vol. 1978), it should do so in the context of a case that more forthrightly raises the pertinent questions. A determination of the question presented by the present appeal, that is, whether a mortgagee is entitled to notice other than by publication, will not resolve the broader question raised by the cases relied upon by the Board, that is, whether a landowner is entitled to such additional notice. Neither party can be

expected to brief this broader question if the case is set for plenary review. If the broader question must be resolved, this Court certainly would receive more guidance toward its resolution if the Court waited to hear from parties with more than an intellectual interest in the outcome. As noted previously, only one decision aside from the one on appeal and the opinion it relied on could be found that examined the due process rights of mortgagees. See Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 52 (1964). The cases relied upon by the Board indicate that the question of adequate notice arises far more often in the context of an owner, and this is the question this Court should resolve if a resolution is necessary.

In addition, the present case is not one demanding for equitable reasons that this Court reach a different conclusion

than was reached below. The Board does not contest the fact that property taxes were not paid. Yet the state has a right to collect such taxes. The Board could have ensured that the taxes were paid in any number of ways, most simply by asking its mortgagor whether she had paid the taxes and, if she had not, then paying them itself.

The only other question raised by the Board is whether the state may distinguish between mortgagees and owners in giving notice without violating the equal protection clause. Compare Ind. Code § 6-1.1-24-3 with Ind. Code § 6-1.1-24-4 (Repl. vol. 1978). This question raises few constitutional problems and can be dispensed with quickly. Because neither a suspect class nor a fundamental right is involved in the classification, any reasonable justification advanced by the state should

be upheld. Western and Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The state readily could have concluded that the notification of mortgagees was not required by Ind. Code § 6-1.1-24-4 because mortgages often are not recorded or, because mortgagees are often large lending institutions, they are able to protect themselves from the effects of foreclosure by contract. See Furnish, supra, 367 N.E.2d at 601.

Within recent weeks two members of this Court have publicly criticized this Court's "exploding workload." "Lawyers' Ethics on Trial," Newsweek, Aug. 23, 1982, at 37, col. 3. The acceptance of this appeal for plenary consideration would increase that workload without resolving any major constitutional questions that

have not been adequately decided by lower courts and without resolving any essential conflicts in constitutional law.

II. THE COURT BELOW PROPERLY RESOLVED THE CONSTITUTIONAL QUESTIONS BEFORE IT.

The Court of Appeals of Indiana in its decision below properly noted the heavy burden placed on one challenging a statute because of the strong presumption of constitutionality that a statute carries with it. Jurisdictional Statement at 19. See also St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981); United States v. Vuitch, 402 U.S. 62 (1971). The Board was not able to overcome this burden with its due process and equal protection challenges in the court below, and that court properly concluded that the Indiana statutory scheme is constitutional.

The present appeal arises from a

rather peculiar fact situation. The mortgagor, who received a default judgment against her at trial court and is not a party to this appeal, was responsible under the mortgage to pay property taxes but did not do so. The Board, as mortgagee, apparently did not discover this situation until after not only the tax sale had occurred, but also after the period of redemption had run. Jurisdictional Statement at 4-5. The court below found that notice by publication was adequate both before and after the tax sale. Id. at 21-24.

Furnish, supra, relied upon by the court below, was decided within the context of a discussion showing that this Court's and other courts' extensions of the decision in Mullane, supra, had never been applied other than to actual owners of property. 367 N.E.2d at 601. Accord,

Township of Montville, supra, 376 A.2d at 923-24 (Conford, P.J.A.D., dissenting). Because of that, and because of the clear distinction in Indiana law between owners and mortgagees, the court in Furnish determined that notice by publication was adequate to inform the mortgagee of the pending tax sale. 367 N.E.2d at 601.

Other courts have clarified the distinction between the situation in Mullane and cases involving a landowner and a tax sale. In Mullane the beneficiaries had little reason to expect that the common trust fund account would be judicially settled. 339 U.S. at 316. In a case involving land taxes, the person owing the taxes knows that taxes are due on a certain day. Chesney, supra, 134 Cal. Rptr. at 243; Marlowe v. Kingdom Hall of Jehovah's Witnesses, 541 S.W.2d 121, 124 (Tenn. 1976).

The Board in the present case also can be assumed to know when taxes are due, yet it did not take any of the avenues open to it to discover whether the taxes had been paid. The Board could have examined public tax records or, more straightforwardly, asked its mortgagor whether she had paid the taxes. It did neither.

The dissent in Township of Montville, supra, a close 4-to-3 decision, noted another reason why notice other than by publication is not appropriate for a landowner in a tax foreclosure sale: New Jersey's experience with mailed notice had proven both administratively and commercially unfeasible. 376 A.2d at 921-22 (Conford, P.J.A.D., dissenting). The plan was administratively unfeasible because (1) the required notices and proofs of service could not be permanently maintained in tax assessors' offices and (2) those

offices could not be adapted to offices of public record. These factors led title insurance companies to conclude that it would be commercially impractical to insure titles based on foreclosures under that system. For these reasons, the New Jersey legislature repealed the requirement of mailed notice.

Such factors, particularly those pertaining to the physical impossibility of keeping records of notice, are certainly within the purview of state interests to be balanced. See Mullane, supra, 339 U.S. at 313-14. When weighed against the ease by which the Board could have discovered whether the taxes on its mortgaged property had been paid, they dictate the conclusion reached by the court below.

One final factor weighs in the state's favor in permitting notice by publication. The state has a right and a duty to

collect taxes and to do so in an efficient and practical manner. See Umatilla County, supra, 507 P.2d at 408. The method Indiana has chosen to adopt accomplishes this goal.

One final point should be made. One case relied upon by the Board, Collector of Revenue v. Parcels of Land Encumbered With Delinquent Tax Liens, 585 S.W.2d 486 (Mo. 1979), does not stand for the proposition that notice by mail is required instead of notice by publication in a tax lien foreclosure action. The statutory scheme required notice by mail and this was upheld against a challenge that notice by personal service was required. In just such a manner, this Court's affirmance of the decision below would in no way invalidate those statutory schemes that require some more certain notice. An ultimate reversal of the decision below, however, would require state legislatures

across the country to reexamine and re-enact many statutory requirements.

CONCLUSION

For the foregoing reasons, the appeal in the present case should be dismissed or the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September, 1982, I forwarded by first class mail, postage prepaid, three copies of the foregoing Motion to Dismiss or Affirm to each of the following:

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